

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

AMERICAN MUNICIPAL POWER, INC.

Employer

and

Case 10–RC–213684

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, LOCAL
UNION NO. 816**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner, International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816, seeks to represent a unit of operator employees that the Employer¹ employs at its Smithland facility. The sole issue in this proceeding is whether the unit description needs to address the voting eligibility of employees from other Employer facilities that the Employer has in the past temporarily assigned to work in the Smithland facility. In the paragraphs that follow, I explain my basis for concluding that it is unnecessary to address their status in the unit description when there are no employees in that status and the Employer has no current plans to temporarily assign these employees to the Smithland facility in the future.

On January 26, 2018, the Union filed a petition with the Region seeking an election to become certified as the bargaining representative of certain employees of the Employer at its Smithland, Kentucky facility. The petitioned-for unit description is:

Included: All full-time and regular part-time employees of the Employer performing work at its facility located at 1297 Smithland Dam Rd., Smithland, KY 42081

Excluded: Office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

On January 29, 2018, the Union filed an amended petition to correctly note that it had requested voluntary recognition from the Employer on January 22, 2018 and the Employer had not yet responded.

A hearing officer of the National Labor Relations Board conducted the hearing in this matter on February 6, 2018, and gave all parties the opportunity to present evidence on the issues raised by the petition, to examine and cross-examine witnesses, and present arguments and case law in support of their positions.

¹ The Employer is an Ohio corporation that generates, transmits, and distributes electric power and energy to its member-consumers in Kentucky. Its headquarters is located in Columbus, Ohio, and it has a power generation facility located at 1297 Smithland Dam Road, Smithland, Kentucky, the only facility involved.

Both the Employer and the Petitioner agree that employees who work at other facilities but who work temporarily at the Smithland facility should not be permitted to vote in this election. However, the dispute at the hearing is whether specifically to exclude these employees in the unit description, or whether to leave their status unanswered for now so that the parties may handle their placement through the collective-bargaining process should the issue arise in the future.

After reviewing the evidence, I find the following unit to be an appropriate for collective bargaining, and therefore, I am directing an election in this matter for the following unit:

All full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

To provide a context for my discussion, I will first discuss the position of the parties and then provide my legal analysis to explain why I conclude the petitioned-for unit (as clarified during the hearing) is an appropriate and unambiguous unit and there is no need for additional language specifically excluding employees from other Employer facilities who temporarily work at the Smithland facility.

I. Position of the Parties

The Employer's primary argument is that the unit description should specifically exclude employees normally employed at other Employer facilities but temporarily assigned to the Smithland facility. The Employer made an offer of proof and also had one witness testify at the hearing. The Employer's evidence showed there are eight employees who work at the Smithland facility. The Employer further identified five other employees from other Employer facilities whom it had occasionally, sporadically, or periodically assigned to the Smithland facility.

The Employer argues that only the eight employees primarily assigned to work at the Smithland facility should be included in the unit. The Employer acknowledged at the hearing that it currently has no employees from other facilities temporarily assigned to work at the Smithland facility and it has not scheduled any employees to do so in the future. The Employer noted, however, there had been an employee temporarily working at the Smithland facility two days before the Petitioner filed the petition. The Employer argues these temporarily-assigned employees do not share a community of interest with the eight employees who primarily work at the Smithland facility. The Employer believes the petitioned-for unit is broad enough to cover employees who are temporarily assigned to work at the Smithland facility, and therefore the unit description should clearly state which employees are specifically included (for example, "employees primarily assigned to the Smithland facility"), or somehow specifically exclude employees who are primarily assigned to other facilities.

The Petitioner agrees that only the eight employees currently employed at the Smithland facility should be eligible to vote, but the Petitioner does not want to alter the unit description as the Employer suggests. The Petitioner contends that it used standard unit-description language to describe the petitioned-for unit and that this unit is appropriate and unambiguous. It argues that both the Employer and Petitioner agree as to the eight employees covered by the description evidences this. The Petitioner contends that, if it were to agree to the Employer's proposed unit description, the unit placement of employees temporarily performing bargaining unit work at the Smithland facility (should the Employer assign employees to do so in the future) would be a permissive subject of bargaining instead of a mandatory subject of bargaining. The Union does not want to acquiesce to an automatic exclusion of these employees from the bargaining unit and would prefer to bargain over their placement with the Employer should the issue arise in the future.

Thus, the only issue is whether the unit description should address the placement of employees from other Employer facilities temporarily assigned to the Smithland facility.

II. Factual Findings

The Employer operates power generation facilities located near dams. The Smithland facility is a relatively newer power generation facility that only began full operation in about May 2017. Employees began working at the Smithland facility prior to the facility becoming fully operational, with at least one employee starting in July 2016. Prior to the facility becoming fully operational and during the first months of full operations, some employees from another Employer facility, the Cannelton facility, spent days working at the Smithland facility. Four employees who worked as operators at the Cannelton facility held temporary assignments to the Smithland facility for just a few days at a time. Operator Woosley spent one day in April 2017 working with the Smithland employees. Operator Haycraft spent two days in April 2017 training and assisting Smithland facility employees. Operator Stewart spent three days in June 2017 and one day in July 2017 training Smithland facility employees. Lastly, Operator Harrell spent four days in March 2017 and some more time in July 2017 working with the Smithland employees.² All four of these employees came from the Cannelton facility and the work they did at the Smithland facility alongside other Smithland employees involved either training the Smithland employees in how to do their normal work, or assisting the Smithland employees with their normal operator work. As indicated by the dates of their work, it has been over six months since a Cannelton employee had a temporary assignment for less than a week of work at the Smithland facility, and the Employer acknowledged there was no current plan or schedule for any temporary assignments in the future.

An additional Cannelton employee held a temporary work assignment at the Smithland facility but the assignment differed from the four mentioned above. Cannelton employee operator Joe Frakes worked at the Smithland facility about five days a week from about June 2017 to October 2017 and then about one day a week from October 2017 until mid-January

² Neither party provided evidence on how many days Mr. Harrell spent working at the Smithland facility during July 2017.

2018. Frakes spent about 50 percent of his time doing operator work alongside the other Smithland employees and the other 50 percent of his time doing administrative work to assist the Employer while there was an open supervisor position at the Smithland facility. The supervisor at the Smithland facility retired in June 2017 and it has taken longer than anticipated for the Employer to bring in a new supervisor. During this time, Director of Hydroelectric Operations Rod Woodward spent much of his time at the Smithland facility, and Frakes' administrative role was to assist Woodward by reviewing paperwork, approving purchase orders, and organizing electronic files for the sake of facilitating eventual transition to a new regular supervisor. Neither party asserted that Frakes was a supervisor and the evidence indicated Frakes works as an Operator II at the Cannelton facility in a non-supervisory capacity.

The Employer paid for the travel and required lodging for all five of these employees who worked temporarily at the Smithland facility. There is no evidence that the Employer changed the pay or job description of the five employees for their work at Smithland. All five employees engage in the same type of operator work at the Cannelton facility as the petitioned-for Smithland employees do at the Smithland facility, and their rates of pay at each facility are similar.

The evidence establishes that four of the five employees from other facilities who worked temporarily at the Smithland facility did so as part of the Employer's initiation of operations at Smithland. That facility is now fully operational. The fifth employee assisted a manager after the supervisor at the facility retired. None of them worked there based on an ongoing need for temporary help at that facility. Other than these five, no other employees from other Employer facilities have held a temporary work assignment to do operator work at the Smithland facility. The Employer also currently has no scheduled plans for any employees from other facilities to perform temporary work assignments at the Smithland facility. The Employer asserted it could conceive of an instance when it might need temporary work assignments, such as an operations issue requiring the additional expertise of some of the employees at the Cannelton facility, or if there was a severe staffing issue (for example due to sickness) and the Smithland facility needed some additional workers to make sure the facility kept running properly.

Regarding the appropriate unit description for eligible voters at the election, both parties appear to agree on many of the same inclusions and exclusions. During the hearing, the hearing officer offered a suggested stipulation that an appropriate unit would include "all full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky" and exclude "all office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act." The Petitioner agreed that this unit would be appropriate. The Employer had no objection to changing the inclusions to specifically name the job titles of Operator I and Operator II and to exclude confidential employees, but would not agree to the stipulation unless the unit description noted the included employees were those "primarily assigned" to the Smithland facility. The Petitioner did not agree to the Employer's proposed change to the included employees as being those "primarily assigned." The hearing officer noted what the parties did and did not agree to and moved on to the rest of the hearing.

III. Analysis

The Employer relies on *Indiana Bottled Gas*, 128 NLRB 1441 (1960), where the Board, in a decision and direction of election, specifically excluded temporary and casual employees from the voting unit description despite that the employer in that case did not then employ any temporary or casual employees. In a footnote, the Board explained that the employer had a history of employing part-time temporary employees during the employer's busy season, but these employees did not have any expectation of recall nor was there a practice of recalling these employees on a regular basis. Therefore, the Board specifically excluded "temporary and casual employees" in the unit description. *Id.* at 1443 fn. 3. The Employer also relies on *FW Woolworth*, 119 NLRB 480 (1957), as another example where the Board specifically excluded "intermittent" employees. Like the employer in *Indiana Bottled Gas*, the employer in *FW Woolworth* routinely hired these employees for busy seasons for a finite duration, and then let them go. Unlike the Employer in this case, who has no current plans to temporarily assign employees to Smithland, the employers in *Indiana Bottled Gas* and *FW Woolworth* consistently hired temporary or "intermittent" employees during their busy seasons and thus it made sense in those cases to settle their status notwithstanding that the employer had no such employees at the time of the hearing. There is no such concern compelling me to settle the status of the Employer's employees temporarily assigned to the Smithland facility.

Indiana Bottled Gas also involved temporary employees. The term "temporary employees" typically refers to employees who have a finite end date for their employment separate from permanent employees. See *Marian Medical Center*, 339, NLRB 127, 128 (2003). (The "intermittent" employees in *FW Woolworth* had the same status as the temporary employees in *Indiana Bottled Gas*.) The "temporary employees" in this case are actual permanent employees of the Employer who work at a different location and have only been "temporarily" assigned to the Smithland facility on an ad hoc basis. In the event the Employer changes plans and routinely assigns such employees to the Smithland facility in the future, there may be factors that make including them in the unit a more compelling argument than the truly ephemeral employees in *Indiana Bottle Glass* and *FW Woolworth*. Leaving the temporarily assigned employees out of the exclusions at this time leaves more room for the parties to adjust their unit description by negotiation, if they wish, in the event the Employer begins to assign such employees to Smithland.

Board law also supports omitting the placement of employees temporarily assigned to Smithland in the absence of any finite plans on the Employer's part to resume assigning these employees to that facility. In representation cases, "the Board looks to the actual, existing composition of units and to employees actually working to determine the composition of units." *Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844, 844 (1993). For example, the Board has dismissed unit clarification petitions when the petitioned for classification had no actual employees within the classification. *ITT World Communications*, 201 NLRB 1, 2 (1973). Furthermore, the concerns the Petitioner raised in voluntarily agreeing to specifically exclude employees on temporary assignment are valid. The issue of temporary assignments from other facilities is not a unique issue and should the Petitioner become the certified representative of the

petitioned-for unit, such an issue is one that is better resolved through the collective-bargaining process. *Union Electric*, 216 NLRB 666, 667 (1975).

Therefore, I find the petitioned-for unit (as clarified during the hearing) is an appropriate and unambiguous unit and there is no need for additional language specifically excluding employees who work at other Employer facilities not addressed in this petition.

IV. **Conclusions and Findings**

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's ruling made at hearing are free from prejudicial error and are affirmed.
2. As the parties stipulated,
 - a. the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here;
 - b. the Petitioner claims to represent certain employees of the Employer; and
 - c. the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, professional employees, confidential employees guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816.

A. Election Details

The election will be held on Friday, February 23, 2018 from 6:30 a.m. to 7:30 a.m. and 6:30 p.m. to 7:30 p.m. (all times Central Time) at the Conference room at the Employer's facility located at 1297 Smithland Dam Road, Smithland, Kentucky 42081.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **February 11, 2018** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Monday, February 19, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least three full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

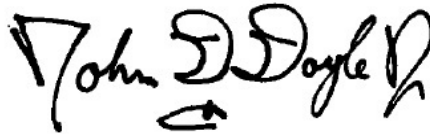
RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: February 15, 2018

A handwritten signature in black ink, reading "John D. Doyle Jr." with a stylized flourish at the end.

JOHN D. DOYLE JR.
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
233 Peachtree Street NE
Harris Tower Suite 1000
Atlanta, GA 30303-1504